SERVED: December 2, 2004

NTSB Order No. EA-5125

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 29th day of November, 2004

APPLICATION OF TED RAY MOORE For an award of attorney fees and expenses under the Equal Access to Justice Act	Docket 299-EAJA-SE-15329

OPINION AND ORDER

Applicant has appealed from the written order of Administrative Law Judge William A. Pope, II, issued on March 27, 2003, denying applicant's petition for attorney's fees and expenses pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504.[1] For the reasons that follow, applicant's appeal is denied and the law judge's order denying fees and expenses is

[1] A copy of the law judge's order is attached.

affirmed.

Background

In the underlying enforcement case, applicant[2] was charged with violating 14 C.F.R. §§ 91.123(a) and 121.535(f) in that he deviated from an air traffic control (ATC) clearance on departure from Anchorage, Alaska, on November 22, 1997, when he was serving as pilot in command of Hawaiian Airlines flight 939. Specifically, the Administrator's complaint charged applicant with failing to initiate a turn to a heading of 190° at a certain point in the departure, as specified in the applicable standard instrument departure (SID), and with failing to advise ATC at any time that he could not timely comply with the 190° heading requirement. The Administrator's evidence included the tape of flight 939's communications with ATC,[3] and testimony from FAA Inspector Wendell Williams, who was riding in the jump seat as an observer during the flight.

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[2] Applicant was referred to as "respondent" in the enforcement proceeding.

[3] On this tape, the controller questioned applicant's flight shortly after takeoff, saying, "Hawaiian 939, are you turning right now?" and flight 939 responded, "we're making a right turn to 190." Soon after that the controller instructed the flight to fly a heading of 210°, and shortly thereafter asked, "were you unable to turn the aircraft any earlier than that?" The response was, "Ah, Ah, Hawaiian 939, ah we, ah, Roger. We just had a 15 degree bank, ah, we're a little heavy," to which the controller replied, "Yeah, that got too close for me to the mountains out there."

After a four-day evidentiary hearing, the law judge dismissed the § 91.123(a) charge, crediting applicant's and his fellow crewmembers' accounts of the events, finding them more reliable than that of Inspector Williams.[4] They testified that the turn was initiated in a timely manner, but was then interrupted because the first officer had mistakenly said "don't turn" as a result of a misunderstanding of the terms of the SID. Accordingly, the law judge found that the Administrator had not established the § 91.123(a) violation. However, the law judge affirmed the § 121.535(f) charge as an independent (as distinguished from a residual) violation, finding that, after the first officer's misunderstanding and his "don't turn" comment had been resolved, it was careless for applicant not to have notified ATC at that time of his inability to timely complete the turn.[5]

On appeal, the Board upheld the law judge's dismissal of the 91.123(a) charge, but on different grounds. The Board

[4] The law judge explained that he found Inspector Williams "to be an entirely credible witness," but that he was less familiar with the terms of the SID than the crew and "[t]o the extent that his recollection of the sequence of events differs from that of the crew who were actually involved with flying the aircraft, I find the recollection of the latter to be more reliable."

[5] The SID requires pilots to notify ATC "prior to departure" if they will be unable to comply with the terms of the SID. As previously noted, the complaint charged applicant with failing to notify ATC "at any time."

stated that the facts clearly showed that applicant deviated from the departure clearance, and that the focus of the hearing should therefore have been on the viability of his emergency defense. However, the Board held that the law judge's credibility determinations compelled the Board to find that a legitimate emergency existed and that applicant responded reasonably to it. On the basis of these credibility determinations, which included the law judge's finding that applicant had conducted a pre-flight briefing on the SID after the flight's last-minute runway change (which contradicted Inspector Williams' testimony on this point), the Board reversed the 121.535(f) violation, noting that the Administrator had not clearly charged this as an independent violation. The Board held that applicant had not been put on notice that he was being charged with anything other than a residual charge of carelessness. Thus, applicant prevailed fully on the merits. This EAJA application followed.

In denying the EAJA application, the law judge found that, despite the Administrator's loss on the merits, she was substantially justified under the EAJA in pursing the case to a hearing. He cited our long-standing case law holding that "when key factual issues hinge on witness credibility, the Administrator is substantially justified – absent some

additional dispositive evidence – in proceeding to a hearing where credibility judgments can be made on those issues."[6] The law judge noted that, "[w]hat took place in the cockpit before and during the takeoff from the Anchorage Airport clearly hinged on witness credibility." He noted that there had been conflicting testimony on key points (including whether or not the first officer said "don't turn" as applicant initiated the turn, and whether or not applicant conducted a second pre-departure briefing after the last-minute runway change), and that he had resolved the issues in favor of the crewmembers' version of events.

On appeal, applicant contends that the case did not hinge on credibility determinations, that the Administrator failed to conduct an adequate investigation into the facts, and if she had she would have discovered that there was no conflict regarding the facts. Applicant maintains that any deviation from the SID was justified by an emergency situation, the existence of which was corroborated by the recollections of the Administrator's own witness, Inspector Williams. Accordingly, applicant argues, the facts alleged by the Administrator had no basis in truth and there was no reasonable basis in law for the Administrator's

[6] See Administrator v. Caruso, NTSB Order No. EA-4165 (1994); Administrator v. Conahan, NTSB Order No. EA-4276 (1994); and Administrator v. Martin, NTSB Order No. EA-4280 (1994).

legal theory.

In her reply brief, the Administrator contests applicant's characterization of the facts in the case as "undisputed," and argues that the case turned completely on credibility. She cites the testimony of Inspector Williams and the ATC tape as evidence in support of the alleged violations. She argues that if the law judge had credited the testimony of Inspector Williams, the charges would have been established.[7] The Administrator further asserts that she was not obligated to accept uncritically applicant's exculpatory claims, and that her decision not to accept those claims as true does not constitute a failure to properly investigate. As discussed below, we agree.

Discussion

For the Administrator's position to be found substantially justified it must be reasonable in both fact and law. That is,

[7] The Administrator's brief stated that applicant had mischaracterized the testimony. She noted that Inspector Williams testified that applicant did not initiate his turn until after he was queried by ATC, and that the discussion between applicant and his first officer regarding the terms of the SID occurred after the controller query, not before, as applicant contends. Inspector Williams also testified that there was no preflight briefing on the relevant SID procedures, and that in his discussion of the incident with the flight crew after the completion of the flight, there was no mention of an emergency situation or any "don't turn" comment by the first officer.

the facts alleged must have a reasonable basis in truth, the legal theory propounded must be reasonable, and the facts alleged must reasonably support the legal theory.[8] We find that standard has been met in this case.

The key allegations in this case were that applicant failed to initiate the turn to 190° at the point specified in the SID, and that he failed to advise ATC that he could not comply with the requirements of the SID.[9] The eyewitness testimony of Inspector Williams, if credited, coupled with the ATC tapes (indicating the controller had safety concerns about the flight's delayed turn) clearly established that applicant did not make the turn at the prescribed time, and did not inform ATC at any time that he would be unable to make the turn as prescribed. As the Board stated in its decision on the merits, the evidence is clear that "respondent failed to make the turn and complete it as required. That is a fact, and it compels a conclusion that respondent deviated from the clearance." Thus, the Administrator's prima facie case was justified in both fact

[8] Conahan, EA-4276 at 2, citing U.S. Jet, Inc. v. Administrator, NTSB Order No. EA-3817, at 2 (1993); and Pierce v. Underwood, 487 U.S. 552, 565, 108 S.Ct.2541 (1988).

[9] The Administrator also appears to have based her case on the premise that applicant did not climb as rapidly as practical after taking off, as required by the SID, and she presented evidence on this at the hearing. However, the complaint does not explicitly allege that applicant failed to comply with the SID in this respect.

and law.

The applicant's affirmative defense, as asserted in his answer to the complaint, was that Inspector Williams' presence in the cockpit "served as catalyst and cause of an emergency situation," and that any deviation from the SID was justified by this emergency situation. The record shows that the Administrator took appropriate steps to clarify, evaluate, and investigate the validity of this asserted emergency and applicant's accusations that the Administrator did not properly investigate this assertion are baseless. The Administrator's counsel discussed with applicant his position that an emergency existed even before she filed her complaint, at the informal conference (Exhibit C-5), and attempted to discover details about the applicant's position that an emergency existed during his pre-trial deposition (Exhibit C-11, p. 39).

Thus, the Administrator's counsel was well aware of the conflict between Inspector Williams' and applicant's stated recollections of the relevant events, and she brought this to the attention of the investigating inspector. (See Exhibit R-8.) Given the prima facie evidence in support of the violation, and the disparity between applicant's and Inspector Williams' recollections of the relevant events, the Administrator was justified in pursing the case to a hearing so that a credibility

judgment could be made.

It was not unreasonable for the Administrator to question the validity of the applicant's asserted emergency defense. This is especially so in light of: (1) applicant's failure to declare an emergency during the flight; (2) applicant's failure to mention the first officer's "don't turn" comment, or the existence of any emergency in his explanation to Inspector Williams immediately following the flight; (3) applicant's failure to mention the first officer's "don't turn" comment, or the existence of any emergency in his response to the FAA's initial letter of investigation (in that response he stated only that any irregularity in the departure was due to "adverse weather conditions"); and (4) applicant's failure to mention the first officer's "don't turn" comment when he first outlined his affirmative defense in response to the Administrator's complaint. Given these factors, it is understandable why the Administrator may have been reluctant to uncritically accept applicant's version of the facts as more credible than Inspector Williams, who was also present. As noted above, we have long held that where key factual issues hinge on witness credibility, the Administrator is substantially justified – absent some additional dispositive evidence – in proceeding to a hearing

where credibility judgments can be made on those issues.[10] This case is a textbook example of that principle.

Further, the Administrator's legal theory was reasonable. The Administrator's primary legal position was that the applicant's deviation from the ATC clearance was not excused by the "don't turn scenario" because (if Inspector Williams' recollections were credited) this scenario did not occur. In the alternative, the Administrator reasonably argued that, if it did occur, the situation was of his own making because it could fairly be surmised that the first officer's confusion as to the terms of the SID was the result of a non-existent or faulty pre-flight briefing and, therefore, the first officer's confusion did not excuse the violation. This legal position is consistent with long-standing case law that an emergency of a pilot's own making does not excuse a regulatory violation. Administrator v. Moore, NTSB Order No. EA-4992 (2002) at 4.

Finally, to the extent that there was procedural unfairness in the law judge's affirming the § 121.535(f) violation as an independent violation, without applicant being put on notice that it was anything other than a residual violation, this should not be counted against the Administrator in evaluating whether she was substantially justified in pursing the case.

[10] See cases cited in footnote 6.

The Administrator's complaint fairly included the § 121.535(f) charge as a residual violation. Her evidence and argument at the hearing appears to have been directed primarily at the § 91.123(a) charge, and she did not ask the law judge to affirm the § 121.535(f) violation as an independent charge.

ACCORDINGLY, IT IS ORDERED THAT:

1. Applicant's appeal is denied; and

2. The law judge's order denying fees and expenses pursuant to EAJA is affirmed.

ENGLEMAN CONNERS, Chairman, ROSENKER, Vice Chairman, and CARMODY, HEALING, and HERSMAN, Members of the Board, concurred in the above opinion and order.